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In The Supreme Court of the United States

MOHAWK INDUSTRIES, INC.,

Petitioner,

v.

SHIRLEY WILLIAMS, GALE PELFREY, BONNIE JONES, AND LORA SISSON, INDIVIDUALLY AND ON BEHALF OF A CLASS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS, ASSOCIATED BUILDERS AND CONTRACTORS, INC., THE CARPET AND RUG INSTITUTE, AND AMERICAN STAFFING ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF AMICI CURIAE[1]

The National Association of Manufacturers (NAM) is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all fifty states. The NAM's mission is to enhance the competitiveness of American manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the vital importance of manufacturing to America's economic future and living standards.

Associated Builders and Contractors, Inc. (ABC) is a national association representing 23,000 merit shop construction and construction-related firms in seventy-nine chapters across the United States. ABC's membership represents all specialties within the domestic construction industry and is composed primarily of firms that perform work in the industrial and commercial sectors of the industry. ABC serves as the construction industry's voice with the legislative, executive, and judicial branches of the federal government and with state and local governments.

The Carpet and Rug Institute (CRI) is the national trade association representing the carpet and rug industry. The Institute's membership consists of manufacturers representing over ninety-five percent of all carpet produced in the United States as well as suppliers of raw materials and services to the industry. The Institute also coordinates with other segments of the carpet and rug industry, including

[1] The parties have consented to the filing of this brief. Their consent letters are on file with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, counsel for amici curiae certifies that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than amici has made a monetary contribution to the preparation and submission of this brief.

distributors, retailers, and installers. CRI members and staff are intensely involved in facilitating cooperative solutions to all industry challenges, including in the area of governmental affairs.

The American Staffing Association (ASA) is the largest national trade association representing temporary and contract staffing agencies in the United States. Its more than 1,100 member firms operate over 15,000 offices that generate approximately eighty-five percent of U.S. staffing industry revenues. ASA promotes its members' interests by encouraging ethical business conduct, educating its members regarding laws and regulations applicable to the staffing industry, and fostering public and governmental understanding of the industry and its beneficial role in the economy.

Certain members of the above-listed organizations, as well as other organizations in their industries and trades, have been named as defendants in a number of private civil suits under the Racketeer Influenced and Corrupt Organizations Act (RICO). Amici curiae submit this brief to address the definition of an association-in-fact enterprise under RICO and to apprise the Court of the unfair and deleterious consequences these organizations will face unless the lower court's ruling is reversed.

SUMMARY OF ARGUMENT

The Eleventh Circuit held that a civil RICO plaintiff can state a claim by pleading that a corporation, in the course of conducting its own hiring affairs, committed predicate racketeering acts in "loose or informal" association with other "distinct entities." In this case, the putatively distinct entities were an employment agency and individual employment recruiters. This holding extends civil RICO

liability unfairly and oppressively to corporations that use third-party service providers to conduct the corporations' own normal business operations.

The effects of such a rule, if it were the law of the land, would be both arbitrary and pernicious. All corporations must carry out their business functions by using agents—whether employees, subsidiaries, or third-party contractors. Indeed, the use of third-party contractors is a ubiquitous feature of modern American business practice. Manufacturers, building contractors, and other employers depend upon employment recruiting firms and staffing agencies to fill their permanent and temporary labor needs in a market where qualified employees are scarce. The Eleventh Circuit's expansive rule will encumber American companies with the burdensome costs of preventing and defending against RICO strike suits. A predictable result of such a rule will be to encourage businesses to avoid RICO liability by foregoing economically advantageous relationships with third-party contractors and vertically integrating their business operations. This was not the goal of RICO.

The decision below also should be rejected because it is loose, unclear, and too easily satisfied at the pleading stage. The Eleventh Circuit's holding provides little, if any, guidance to businesses about how to structure their affairs to minimize exposure to RICO claims. This Court should reject the Eleventh Circuit's "test" in favor of the statute's bright-line rule that excludes corporations from the definition of an "association-in-fact" enterprise. Alternatively, this Court should rule that a corporation and the third-party service providers it relies on to carry out normal business operations cannot constitute a cognizable RICO enterprise.

ARGUMENT

I. THE ELEVENTH CIRCUIT'S DECISION UNFAIRLY EXTENDS RICO LIABILITY TO CORPORATIONS THAT USE THIRD-PARTY CONTRACTORS, SUCH AS EMPLOYMENT RECRUITING FIRMS AND STAFFING AGENCIES, TO CONDUCT NORMAL BUSINESS OPERATIONS. BECAUSE THESE OPERATIONS MUST BE ACCOMPLISHED THROUGH AGENTS, WHETHER EMPLOYEES, SUBSIDIARIES, OR THIRD-PARTY CONTRACTORS, THE LOWER COURT'S DECISION ARBITRARILY ENCOURAGES INEFFICIENT VERTICAL INTEGRATION AND DISCOURAGES NORMAL CONTRACTUAL RELATIONSHIPS.

The Eleventh Circuit's decision in this case upheld the pleading of a civil RICO claim against a corporation, Mohawk Industries, Inc. (Mohawk), for allegedly conducting the affairs of a larger, fictional "association-in-fact" enterprise comprising Mohawk itself, a temporary placement services entity with which Mohawk had a relatively formal business relationship, and other third-party employment recruiters. *Mohawk Indus., Inc. v. Williams*, 411 F.3d 1252, 1257-60 (11th Cir. 2005). Thus, under the Eleventh Circuit's decision, a plaintiff may state a RICO claim against a corporation merely by alleging that the corporation, in the course of conducting what are essentially the corporation's *own* affairs, committed predicate unlawful acts in association with others. Given the extent to which American businesses rely on agents and third-party contractors to carry out routine commercial activities, this ruling can be expected to have a number of pernicious consequences, particularly, but not

exclusively, in the context of employee recruiting and staffing.[2]

At its core, the Eleventh Circuit's decision rests upon an arbitrary distinction between corporations that use third-party agents to conduct corporate activities and corporations that conduct these activities using their own employees, divisions, or subsidiaries. The Eleventh Circuit's decision thus announces a doctrine that will unfairly and oppressively permit claims to proceed against companies that, short of bringing all contracted services "in house," have no alternative but to associate with third-party contractors. From the perspective of the harms RICO is designed to

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[2] If affirmed, the Eleventh Circuit's ruling is likely to encourage the spread of the type of civil RICO claim presently before the Court, that is, suits alleging that employers hired undocumented illegal aliens using outside recruiting firms and staffing agencies brought by either employees seeking treble damages wages or others alleging they were harmed by the hiring of illegal aliens. In recent years, a number of similar lawsuits have been filed. *See Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602 (6th Cir. 2004); *Baker v. IBP, Inc.*, 357 F.3d 685 (7th Cir. 2004); *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163 (9th Cir. 2002); *Commercial Cleaning Servs., LLC v. Colin Serv. Sys., Inc.*, 271 F.3d 374 (2d Cir. 2001); *Canyon County v. Syngenta Seeds, Inc.*, No. CV05-306-S-EJL, 2005 WL 3440474 (D. Idaho Dec. 14, 2005). Counsel for the plaintiffs in *Mendoza* has stated that dozens of employees have contacted him to pursue similar claims in various other industries. *See NPR Morning Edition: Firm Settles Suit Over Undocumented Workers* (NPR radio broadcast Jan. 24, 2006), *available at* http://www.npr.org/templates/story/story.php?storyId=5169694 (last visited Jan. 24, 2006). Even in cases that do not hold much promise of significant monetary recovery, a ruling affirming the Eleventh Circuit's broad approach to association-in-fact enterprises will encourage civil RICO litigation intended primarily to advance a political agenda. Respondents' counsel presents his RICO lawsuits against corporations that allegedly hire illegal aliens as only one front in a private war. *See* Howard Foster, *Letter from Yakima, WA: On the Fruit Front Line* (Nov. 21, 2003), *available at* http://64.233.167.104/search?q=cache:KnEXtDf9mIcJ:www.vdare.com/misc/foster_yakima.htm+%22hward+foster%22+%22letter+from+Yakima%22&hl=en&gl=us&ct=clnk&cd=1 (last visited Jan. 24, 2006).

address, there is simply no basis for distinguishing between these two approaches to running a business.

A. The Eleventh Circuit's Decision Rests Upon An Arbitrary Distinction Between Corporations That Contract With Third Parties For Necessary Services And Corporations That Perform All Such Functions "In House." This Distinction Is Contrary To RICO's Plain Purposes And Will Tend To Discourage Economically Efficient Corporate Contracting In Favor Of Inefficient Vertical Integration.

The courts of appeals universally have rejected attempts to plead a RICO association-in-fact enterprise where the alleged enterprise consists of the corporation together with its employees, *see, e.g., Riverwoods Chapaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2d Cir. 1994), or the corporation with its subsidiaries, *see, e.g., Bessette v. Avco Fin. Servs., Inc.* 230 F.3d 439, 449 (1st Cir. 2000). The Second, Third, and Seventh Circuits have reasonably extended this principle to cases involving corporations and third-party service contractors, and have rejected attempts to plead association-in-fact enterprises in cases involving corporations contracting with third-party agents to conduct routine business activity. *See Baker v. IBP, Inc.*, 357 F.3d 685, 691 (7th Cir. 2004); *Fitzgerald v. Chrysler Corp.*, 116 F.3d 225, 226-27 (7th Cir. 1997); *Discon, Inc. v. Nynex Corp.*, 93 F.3d 1055, 1064 (2d Cir. 1996); *R.R. Brittingham v. Mobil Corp.*, 943 F.2d 297, 300-02 (3d Cir. 1991). These courts have recognized that there is no functional difference between a corporation that conducts certain activities, such as recruiting employees or distributing products, through its own internal divisions or subsidiaries and one that performs these functions through the use of third-party agents. In both instances, the

corporation is simply conducting its own affairs, not the affairs of a separate and distinct enterprise. *See, e.g., Fitzgerald*, 116 F.3d at 227 ("What we cannot imagine, and what we do not find any support for in appellate case law, is applying RICO to a free-standing corporation such as Chrysler merely because Chrysler does business through agents, as virtually every manufacturer does."); *Brittingham*, 943 F.2d at 301 ("We believe a § 1962(c) enterprise must be more than an association of individuals or entities conducting the normal affairs of a defendant corporation.").

In contrast to these rulings, the decision below would allow a plaintiff to plead a RICO claim against a corporate defendant simply by alleging that the corporation contracted with third-party service providers to accomplish an essential corporate function, in this case hiring employees. The Eleventh Circuit thus creates an arbitrary and oppressive distinction between corporations that conduct their operations through outside contractors and corporations that conduct these operations internally or through wholly-owned subsidiaries. If, in this case, the plaintiffs had pleaded that Mohawk recruited its employees solely through an internal department charged with identifying and hiring potential employees, the plaintiffs would not have stated a claim under the accepted principle that a corporation together with its employees cannot constitute a RICO enterprise distinct from the corporation itself. Only because Mohawk allegedly retained a third-party recruiter to accomplish this task has the Eleventh Circuit permitted plaintiffs to proceed with their RICO claim. Whether it had used outside recruiters or an internal recruiting department, Mohawk has done nothing more than conduct a routine and essential business task, hiring employees. The Eleventh Circuit offered no reason why Mohawk's use of outside recruiters presented the particular concerns RICO was designed to address.

This Court has identified two distinct purposes underlying RICO. The first of these purposes is to protect corporations from persons and entities that would use the corporations for their own unlawful purposes. *See Cedric Kushner Promotions, Ltd. v. Don King*, 533 U.S. 158, 162 (2001) (identifying as among RICO's purposes "prevent[ing] a person from victimizing, say, a small business" and "prevent[ing] a person from using a corporation for criminal purposes"). The second, distinct purpose of the RICO statute is to facilitate the prosecution of organized crime. *See United States v. Turkette*, 452 U.S. 576, 584 (1981) (observing that RICO addresses not only the misuse of "legitimate businesses," but also the operation of "wholly illegitimate enterprises"). The statute accomplishes its first purpose in part by making it unlawful to "conduct [an] enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(c) (2000). The statute accomplishes its second purpose by defining "enterprise" to include "group[s] of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4) (2000). Consistent with this statutory language and the decisions of this Court, the courts of appeals have consistently identified RICO's twin purposes as the protection of legitimate businesses from criminal misuse and the prosecution of organized crime. *See, e.g., Brittingham*, 943 F.2d at 300; *Sinclair v. Hawk*, 314 F.3d 934, 943 (8th Cir. 2003); *Aetna Cas. & Sur. Co. v. P & B Autobody*, 43 F.3d 1546, 1558 (1st Cir. 1994).

There is nothing, however, in the language, legislative history, or judicial interpretations of RICO to support the arbitrary and economically irrational penalization of corporations that use third-party contractors to perform functions that other corporations perform "in house." Amici, like Chief Judge Posner of the Seventh Circuit Court of Appeals, "have never heard it suggested that RICO was intended to encourage vertical integration . . . ." *See*

Fitzgerald, 116 F.3d at 227. To the contrary, it is plainly offensive to RICO's business-protective purposes to transform the statute from a shield designed to protect legitimate businesses from misuse into an arbitrary and discriminatory weapon for suing businesses that rely on third-party service providers. Just as the courts of appeals have unanimously refused to subvert RICO's business-protective purposes by rejecting alleged association-in-fact enterprises predicated on corporations acting through employees and subsidiaries, so too should this Court refuse to apply the statute to the materially identical circumstances of corporations using third-party service contractors.

B. The Use Of Third-Party Service Contractors, Including Recruiting Firms And Staffing Agencies, Is A Ubiquitous Feature Of The Modern American Economy.

The Eleventh Circuit's decision has the potential to expand dramatically the filing of civil RICO claims because American businesses increasingly rely on independent agents and contractors in carrying out routine commercial activities. In particular, a growing number of American companies from diverse industries use third-party recruiting firms to hire permanent workers and third-party staffing agencies to obtain temporary and contract employees.[3] Recruiting firms and staffing agencies perform vital functions for American business, both by reducing the transaction costs involved in matching skilled employees with employers and by enabling

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[3] *See* JESSICA COHEN, WILLIAM T. DICKENS, & ADAM POSEN, HAVE NEW HUMAN RESOURCE MANAGEMENT PRACTICES LOWERED THE SUSTAINABLE UNEMPLOYMENT RATE? 8-10 (2001), *available at* http://www.brookings.org/views/papers/dickens/-20010515.htm (citing various studies documenting the explosive growth of temporary and contract labor in the 1980s and 1990s) (last visited Jan. 23, 2006).

employers to meet their labor demands during periods of relative labor scarcity.[4]

The gap between manufacturers' need for skilled workers and the decreasing number of workers available to meet this demand is one of the most significant problems facing American manufacturers today.[5] This dearth of skilled labor frustrates manufacturers' ability to achieve optimal production levels, increase productivity, and meet consumer demand.[6] In a recent study, eighty-one percent of manufacturers surveyed stated that they were facing a moderate to severe shortage of qualified workers.[7] In addition, fifty-three percent of survey respondents stated that at least ten percent of their total positions currently remain unfilled due to a lack of qualified candidates.[8]

Faced with a shortage of permanent skilled labor, manufacturers and employers in other industries rely heavily on third-party recruiting firms to meet their demand for such workers.[9] Recruiting firms have the resources and expertise

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[4] *See* LAWRENCE F. KATZ & ALAN B. KRUEGER, THE HIGH PRESSURE U.S. LABOR MARKET OF THE 1990S 40 (1999), *available at* http://www.irs.princeton.edu/krueger/working_papers.html (stating that staffing agencies that supply temporary and contingent workers help reduce hiring costs and labor market bottlenecks and facilitate better matches between employees and employers) (last visited Jan. 24, 2006).

[5] *See* DELOITTE CONSULTING & THE NATIONAL ASSOCIATION OF MANUFACTURERS (NAM), 2005 SKILLS GAP REPORT – A SURVEY OF THE AMERICAN MANUFACTURING WORKFORCE 1 (2005), *available at* http://www.nam.org/s_nam/bin.asp?CID=89&DID=235731&DOC=FILE.PDF (last visited Jan. 23, 2006).

[6] *See id.* at i.

[7] *See id.* at 4.

[8] *See id.*

[9] According to the American Staffing Association, independent recruiting firms and staffing agencies are particularly important for companies in all industries during periods of economic growth because companies face rising demand for workers at a time when the labor market often is tightening.

necessary to identify potential employees and match them with appropriate employment opportunities.[10] In contrast, employers often do not have the same ability to identify and match skilled employees with employers' needs. It is often more costly for employers to devote company time and resources to locating and hiring skilled labor than to rely on outside recruiting firms.[11]

In addition to using outside recruiters to satisfy their demand for permanent workers, American companies are increasingly dependent on outside staffing agencies to provide them with temporary, contract, and other contingent employees.[12] The use of temporary and contract workers supplied by outside staffing agencies has expanded substantially since the mid-1990s.[13] By 2004, U.S. staffing

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AMERICAN STAFFING ASSOCIATION (ASA), STAFFING INDUSTRY ECONOMIC ANALYSIS, *available at* http://www.americanstaffing.net/statistics/economic2005.cfm (last visited Jan. 23, 2006).

[10] For example, in confronting a surge in demand for big-screen televisions in 2004, Sony hired 1,700 skilled contingent workers to meet its production needs. Sony used an outside placement firm that had to sift through 15,000 applications just to find the 1,700 employees that were eventually hired. *See* Jim McKay, *Sony ready to hire 1,000*, PITTSBURGH POST-GAZETTE, May 29, 2005, *available at* LEXIS, News Library, Kniritrb File.

[11] In tight labor markets, outside recruiting firms and staffing agencies enjoy economies of scale in recruiting and screening workers, and thus can increase the efficiency with which employees are matched with employers. *See* Susan N. Houseman, Arne L. Kalleberg, & George A. Erickcek, *The Role of Temporary Agency Employment in Tight Labor Markets*, 57 INDUS. & LAB. REL. REV. 105, 125 (2003).

[12] *See* COHEN ET AL., *supra* note 3, at 17-18, 27 (summarizing results of interviews with human resource managers regarding the use of temporary workers supplied by staffing agencies).

[13] The 1990s witnessed an upsurge in the use of contracting, outsourcing, and temporary workers as firms, particularly in the manufacturing sector, reorganized the structure of their hiring of labor in response to increased competitive pressure and technical change. *See* COHEN ET AL., *supra* note 3, at 4-5.

agencies employed an average of 2.55 million temporary and contract workers per day, and had hired a total of 11.7 million employees.[14] American companies rely on outside staffing agencies to provide a reliable source of temporary and contract employees to meet their ever-changing short-term labor needs. The increased use of contract and temporary workers has been a key element of the transformation of the American workplace over the last two decades.[15]

The use of outside staffing agencies to provide temporary and contract workers is particularly important in the manufacturing sector.[16] In the NAM's *2005 Skills Gap Report*, prepared by Deloitte Consulting, one-third of the manufacturing firms surveyed stated that in order to fill their need for highly-skilled employees, they would increase their use of temporary contract workers.[17] Moreover, as noted in a study by the Employment Policies Institute, staffing agencies that supply temporary and contingent workers help to increase employment in the manufacturing sector by providing U.S. companies with the flexibility to adjust their workforces in response to uncertain and ever-changing labor needs.[18] This study found a significant upward trend in the hiring of temporary and contingent workers in the 1990s.[19]

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[14] ASA, *supra* note 9.

[15] *See* COHEN ET AL., *supra* note 3, at 2-4.

[16] *See id.* at 10 (reciting several studies showing the growth in the use of temporary workers in the manufacturing sector).

[17] *See* DELOITTE CONSULTING & NAM, *supra* note 5, at 8.

[18] MARCELLO ESTEVÃO & SAUL LACH, EMPLOYMENT POLICIES INSTITUTE, MEASURING TEMPORARY LABOR OUTSOURCING IN U.S. MANUFACTURING 11-12 (2001), *available at* http://www.epionline.org/studies/estevao_12-2001.pdf (last visited Jan. 25, 2006); *see also* COHEN, ET AL., *supra* note 3, at 18.

[19] ESTEVÃO & LACH, *supra* note 18, at 11.

Outside staffing agencies also play a vital role in the construction industry, an industry that employs 5.6 percent of this country's entire private workforce.[20] While the construction industry as a whole has a relatively steady demand for workers, turnover often is high at individual companies because construction projects are typically of short duration. According to the U.S. Bureau of Labor Statistics, monthly worker turnover in the construction industry can vary between 4.2 and 6.9 percent.[21] This high turnover rate often produces labor shortages, despite the widespread availability of potential employees, due to the high transaction costs of matching available employees to specific employment opportunities. Independent staffing agencies can ameliorate this problem by providing a steady supply of construction workers to construction firms in response to the firms' short-term labor demands. By working with independent staffing agencies, construction firms can avoid the cost of retaining permanent employees in the face of ever-fluctuating demand for construction services, while guaranteeing a pool of available labor that will enable them to respond rapidly to new business opportunities.

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[20] U.S. SMALL BUSINESS ADMINISTRATION, OFFICE OF ECONOMIC RESEARCH, MAJOR INDUSTRIES BY NAIC'S CODES: PRIVATE EMPLOYER FIRMS, ESTABLISHMENTS, EMPLOYMENT AND ANNUAL PAYROLL BY FIRM SIZE, 1998-2002 (2002), *available at* http://www.sba.gov/advo/research/us_tot_mi_n.pdf (last visited Jan. 24, 2006).

[21] U.S. DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, JOB OPENINGS AND LABOR TURNOVER SURVEY (2005), *available at* http://data.bls.gov/cgi-bin/surveymost?jt (last visited Jan. 24, 2006).

C. The Eleventh Circuit's Decision Threatens To Undermine The Stability Of Necessary And Advantageous Business Relationships Between Corporations And Third-Party Contractors By Allowing Such Relationships To Be The Basis For Lengthy And Expensive RICO Suits.

In light of these developments in the business environment, particularly in the manufacturing and construction sectors, the Eleventh Circuit's decision will have a number of pernicious consequences. Because more and more corporations rely on outside recruiting firms and staffing agencies to supply necessary labor, a rule that enables plaintiffs to plead an association-in-fact enterprise solely because a defendant corporation contracted with an independent service agent will result in an increase in the number of businesses exposed to RICO liability. The Eleventh Circuit's unjustifiably relaxed pleading standard for an association-in-fact enterprise may deter corporations from using outside contractors and agents precisely when the use of such agents is becoming increasingly widespread and important to competitive survival. This expansion is unjustified, as it allows plaintiffs to use a statutory tool designed to prevent the misuse of organizations and eradicate organized crime against corporations that have simply adapted to the economic realities of doing business in the Twenty-First Century global economy. There is simply no reason to think that corporations that conduct their hiring activities with the assistance of third-party recruiting firms or staffing agencies pose the threats RICO was designed to combat any more than corporations that conduct these operations "in house."

The problem posed by the Eleventh Circuit's decision lies in its low threshold for pleading an association-in-fact RICO theory. The decision makes clear that very little is

required at the pleading stage, even if "the plaintiffs may be unable to prove such allegations at trial . . . ." *Mohawk*, 411 F.3d at 1258-60. This poses serious consequences even for sizeable corporate defendants. RICO litigation is complex, lengthy, and expensive. Thus, in *Holmes v. Securities Investor Protection Corp.*, this Court adopted a narrower construction of RICO than that advanced by the plaintiff, noting that a contrary approach "would open the door to 'massive and complex damages litigation[, which would] not only burde[n] the courts, but also undermin[e] the effectiveness of treble-damages suits.'"[22] 503 U.S. 258, 274 (1992) (quoting *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 545 (1983)) (brackets in original); *accord Tafflin v. Levitt*, 493 U.S. 455, 465 (1990) (noting "the complexities of civil RICO actions"); *H.J. Inc. v. Northwestern. Bell Tel. Co.*, 492 U.S. 229, 251 (1989) (Scalia, J., concurring) (criticizing this Court's ruling in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), for

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[22] Despite this Court's rulings narrowing the construction of RICO, the potential for treble damages and fee shifting have continued to make it popular with private plaintiffs. According to the Administrative Office of the U.S. Courts, 840 civil RICO actions were filed in the year ending March 31, 2005 (of which eight were filed by the United States); 695 in the year ending March 31, 2004 (of which four were filed by the United States); 845 in the year ending March 31, 2003 (of which ten were filed by the United States); 707 in the year ending March 31, 2002 (of which seven were filed by the United States); and 791 in the year ending March 31, 2001 (of which four were filed by the United States). *See* Federal Judicial Caseload Statistics, Table C-2 (U.S. District Courts—Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit) for each respective year, *available at* http://www.uscourts.gov/library/statisticsalreports.html (last visited Jan. 22, 2006). Although the Administrative Office does not keep track of which RICO cases involve corporate defendants, it is the experience of amici that the vast majority of these cases have been filed against corporations. Furthermore, because the corporate defendant must be "distinct" from the enterprise under *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158 (2001), a large number of these cases involve creative allegations that the corporation is one member of an association-in-fact enterprise that includes additional entities or natural persons.

creating "years" of litigation and "countless millions in damages and attorney's fees").

These cautionary observations have been borne out by another civil RICO case to come before the Court. *National Organization for Women, Inc. v. Scheidler* was filed in 1986, and this Court first considered it on review of an order granting a motion to dismiss. *See* 510 U.S. 249 (1994) (*NOW I*). After this Court reinstated the complaint, the parties engaged in years of discovery and other proceedings before the case came to this Court a second time. *See Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393 (2003) (*NOW II*). Twenty years after it commenced, the case is now before the Court for a third decision. *See* Nos. 04-1244 and 04-1352.

II. THE COURT SHOULD ADOPT A BRIGHT-LINE RULE THAT A CORPORATION CANNOT BE A MEMBER OF A RICO ASSOCIATION-IN-FACT ENTERPRISE OR, ALTERNATIVELY, THAT SUCH AN ENTERPRISE CANNOT CONSIST OF A CORPORATION AND THE THIRD-PARTY SERVICE PROVIDERS IT USES TO CARRY OUT ITS NORMAL BUSINESS FUNCTIONS.

The "test" provided by the Eleventh Circuit's decision provides little, if any, guidance to businesses about how to structure their affairs to minimize exposure to civil RICO claims. The Eleventh Circuit's decision permits a civil RICO plaintiff to cobble together an alleged association-in-fact enterprise comprising a corporation and other "distinct entities," no matter how "loose or informal" is the association among them. *See Mohawk*, 411 F.3d at 1258. This is hardly a standard and, indeed, it demonstrates the unduly broad range of conjured enterprises that plaintiffs may plead under *Turkette* and still survive a motion to

dismiss. The confusion on this point explains the split in the Circuits on the issue raised by Petitioner, and also the uncertain exposure of American companies depending upon the Circuit in which they do business. Amici therefore urge this Court to adopt a bright-line rule that enables businesses to plan efficiently while protecting them from meritless RICO strike suits.[23]

A. Bright-Line Rules Should Be Preferred In Cases Affecting Significant Commercial Interests, Because Efficient Business Planning Requires Plain And Predictable Statements Of Legal Rights And Obligations.

In the contest between bright-line rules and imprecise standards, it is generally recognized that rules have to recommend them their clarity, uniformity, predictability, and ease of application. *See* Cass R. Sunstein, *Problems with Rules*, 83 Cal. L. Rev. 953, 971-78 (1995); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 Duke

[23] It might be argued that the Eleventh Circuit's "distinct entities" test already constitutes a bright-line rule. However, as noted in Part I, this Court should reject the Eleventh Circuit's analysis because it is inconsistent with RICO's purposes and ignores the reality that corporations always must conduct their business through agents, often including third parties. Moreover, the Eleventh Circuit's opinion does not actually set forth a bright-line rule. Although the opinion states that the members of an association-in-fact enterprise must be "individual entities," *see* 411 F.3d at 1258 (quotation omitted), and also must be "distinct," *see id.*, there is no explanation of what renders one entity "individual" or "distinct" from another. Thus, at the pleading stage, the Eleventh Circuit's opinion amounts to no more than a "wait and see" approach, and not a bright-line rule. As amici argue in the main text, this Court should issue a clear pronouncement that corporations do not even qualify as "individuals" under RICO's definition of an association-in-fact enterprise. Alternatively, the Court should adopt the same clear rule of limitation applied by the Second, Third, and Seventh Circuits that corporations are never "distinct" from the agents they rely on to conduct normal business activities.

L.J. 557, 571-624 (1992); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1178-81 (1989); Pierre Schlag, *Rules and Standards*, 33 UCLA L. Rev. 379, 384-90 (1985). These considerations are especially important in cases affecting significant commercial interests and commonplace business practices, because efficient business planning requires plain and predictable statements of legal rights and obligations. *See* Sunstein, *supra*, at 976.

The ability of persons and businesses to understand and exercise their legal rights, and to fulfill their legal obligations, is a matter not only of fundamental fairness, but also of economic efficiency. *See* Scalia, *supra*, at 1179 ("Rudimentary justice requires that those subject to the law must have the means of knowing what it prescribes."); Kaplow, *supra*, at 621 ("[M]any individuals contemplating behavior that may be subject to the law will find it more costly to comply with standards [than with rules], because it generally is more difficult to predict the outcome of a future inquiry . . . than to examine the result of a past inquiry."). Indeed, clarity and predictability are of such importance to business planning that it has become commonplace to observe that a clear rule, even a "bad" one, is better than an unclear rule or no rule at all. *See* Sunstein, *supra*, at 976 ("[I]t may be more important to know what the law is than to have a law of any particular kind."); Jonathan R. Macey, *The Internal and External Costs and Benefits of Stare Decisis*, 65 Chi.-Kent L. Rev. 93, 109 (1989) ("[P]articularly in corporate and contractual settings, it is quite easy for parties to contract around whatever liability rule is imposed by courts. In these settings, it doesn't matter what the particular default legal rule happens to be, so long as it's sufficiently clear that parties don't waste resources engaging in needless negotiations.").

This Court has recognized that clear statements of legal norms are particularly important where the norms affect commonplace business transactions. In the area of state use and sales taxes, for instance, this Court has observed:

> Th[e] artificiality [of a bright-line rule], however, is more than offset by the benefits of a clear rule. Such a rule firmly establishes the boundaries of legitimate state authority to impose a duty to collect sales and use taxes, and reduces litigation concerning those taxes . . . . Moreover, a bright-line rule in the area of sales and use taxes also encourages settled expectations, and in doing so, fosters investment by businesses.

Quill Corp. v. North Dakota, 504 U.S. 298, 315-16 (1992). As the Court recognized in *Quill Corp.*, the importance of a clear rule to business planning is necessarily accentuated where the rule affects routine business transactions, because the costs of repeated inefficient transactions, economically distorted business practices, and foregone commercial opportunities can accumulate rapidly. *See* Kaplow, *supra*, at 621 ("The central factor influencing the desirability of rules and standards is the frequency with which a law will govern conduct. If conduct will be frequent, the additional costs of designing rules—which are borne once—are likely to be exceeded by the savings realized each time the rule is applied . . . . Thus, when behavior subject to the relevant law is frequent, standards tend to be more costly and result in behavior that conforms less well to underlying norms.").

The importance of clarity and predictability increases in direct proportion to the severity of the consequences for noncompliance. A concurrence by four Justices of this Court accordingly recognized that "clarity and predictability in

RICO's civil applications are particularly important" and that "RICO, since it has criminal applications as well, must, even in its civil applications, possess the degree of certainty required for criminal laws." *H.J. Inc.*, 492 U.S. at 255 (Scalia, J., concurring) (joined by Chief Justice Rehnquist and Justices O'Connor and Kennedy).

Against the clarity, uniformity, and predictability of bright-line rules this Court must, of course, balance the possibility of imperfect outcomes in marginal cases. *See* Scalia, *supra*, at 1178. This Court has recognized, however, that the disutility of imperfect results in unusual cases may be vastly outweighed by the benefits of a well-crafted rule of general suitability: "Our cases provide support for the proposition that categorical decisions may be appropriate and individual circumstances disregarded when a case fits into a genus in which the balance characteristically tips in one direction." *United States Dept. of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 776 (1989).

B. This Case Calls For A Bright-Line Rule Excluding Corporations From RICO Association-in-Fact Enterprises Or, Alternatively, A Holding That Such An Enterprise Cannot Consist Of A Corporation And The Third-Party Contractors It Uses To Carry Out Its Normal Business Functions.

It is critical for businesses to have clarity and predictability with regard to the legal liability they may face for their commercial decisions. This includes decisions about how to structure their organizations and with whom to conduct business. If the law creates potential liability for contracting or affiliating with others when there would be no exposure for the same commercial conduct if undertaken unilaterally, that legal liability is a factor that a company

must consider. If, on the other hand, no additional legal exposure is created by hiring third parties to engage in that conduct on behalf of the business, then such a decision will be made based on the merits, including such factors as the quality of the contractor's results and economic efficiency.

Under the Eleventh Circuit's view, a court is required to allow a RICO suit to progress to discovery so long as a plaintiff alleges that a corporate defendant associated itself with some "distinct entity" with which it shared a "common purpose," which could include a goal as pedestrian as "making money." *Mohawk*, 411 F.3d at 1258. This goal is so universal to the notion of business ventures that, if RICO liability could be grounded on this claim, every corporation that maintains contractual and agency relationships could be exposed to treble damages litigation based on an "association-in-fact" theory. The "only effect" of such a RICO rule would be "to encourage vertical integration." *See Fitzgerald*, 116 F.3d at 227. Businesses would seek to shield themselves from the possibility of RICO suits by avoiding economically efficient and mutually beneficial contracts with third-party service providers. In attempting to avoid potential RICO exposure by taking work "in house," businesses would incur significant additional legal and transactional expenses. The cumulative costs of these inefficiencies can reasonably be expected to be enormous. *Cf.* Kaplow, *supra*, at 621. Because such costs would be motivated by a desire to avoid legal liability rather than a desire to achieve economic efficiencies, such a rule would also harm consumers. *See* Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 21 (1984) ("If judges tolerate inefficient practices, the wrongly-tolerated practices will disappear under the onslaught of competition. The costs of judicial error are borne by consumers, who lose the efficient practices and get nothing in return."). Service providers too would be injured, because such a rule would create a smaller

market for their services. This in turn could have deleterious consequences for employees, particularly entry-level job applicants who depend upon recruiting firms and staffing agencies to match their skills with employers' needs.

A bright-line holding is appropriate here because this case "fits into a genus in which the balance characteristically tips in one direction." *Reporters Comm.*, 489 U.S. at 776. The Eleventh Circuit's decision exposes Mohawk to massive civil RICO claims based on its alleged use of employment agencies and recruiters to help locate the employees it ultimately hired. This is a routine—indeed, ubiquitous—corporate practice in today's economy. More generally, as the courts of appeals have consistently recognized, the use of agents and employees to accomplish corporate ends is not merely a commonplace practice, it is a necessity arising from the incorporeal nature of the corporate entity. *See Fitzgerald*, 116 F.3d at 227; *Riverwoods*, 30 F.3d at 344; *Brittingham*, 943 F.2d at 301. To base RICO liability on this fact would render RICO's "association-in-fact" provision a meaningless one in cases against corporate defendants, for corporate defendants could *always* be made to fit this Procrustean bed.

This Court's RICO jurisprudence is consistent with the bright-line advocated by amici. As this Court observed the first time it construed RICO's "enterprise" element, "absurd results are to be avoided . . . ." *Turkette*, 452 at 580; *accord Fitzgerald*, 116 F.3d at 226-27 (in deciding whether a corporation can be part of an association-in-fact enterprise, the court noted "a desire to make the statute make sense and have some limits" and to "avoid absurd applications"). This Court again expressed its skepticism of unusual readings of the RICO statute in its most recent pronouncement on the enterprise issue. Although the Court did not rule on the merits of the issue, it noted in *Cedric Kushner* that it would

be "less natural to speak of a corporation" as being associated with its own employees and agents—an "oddly constructed entity." *Cedric Kushner*, 533 U.S. at 164.

Admittedly, in two cases this Court has favored a broader construction of RICO's "enterprise" requirement over a narrower construction. *See Turkette*, 452 U.S. 576; *NOW I*, 510 U.S. at 260-61. In *Turkette*, the Court concluded that the term "enterprise" included illegitimate enterprises along with legitimate enterprises, noting that Congress easily could have narrowed the sweep of the term "enterprise" by adding the limiting word "legitimate" to the definition in Section 1961(4). *See* 452 U.S. at 581. In *NOW I*, the Court engaged in "parallel" reasoning, noting that Congress had not defined "enterprise" to be limited to groups having an economic motive. *See* 510 U.S. at 260-61.

This case, however, requires a different outcome so as to avoid an absurd result at odds with the statute. Whereas the *absence* of limiting language in Section 1961(4) commanded a broader construction of the term "enterprise" in *Turkette* and *NOW I*, here the *presence* of limiting language commands a narrower construction of the term "enterprise." Congress has circumscribed the sweep of association-in-fact enterprises by using the limiting word "individuals" in defining the associations that are cognizable under the statute. *See* 18 U.S.C. 1961(4) ("'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any *union or group of individuals* associated in fact although not a legal entity") (emphasis added). The "very common" meaning of the word "individual" is "a private or natural person as distinguished from a partnership, corporation, or association . . . ." Black's Law Dictionary 773 (6th ed. 1990); The New Fowler's Modern English Usage 391-92 (3d ed. 1996) ("The *Oxford Advanced Learner's Dictionary of Current English* (4th ed.

1989) defines the noun as follows: 1 a single human being . . . ."). Thus, it is clear from the face of the statute that Congress did not intend for association-in-fact enterprises to include *corporations* associated with others. *Cf. Holmes*, 503 U.S. at 269 n.15 (noting that RICO's statutory language "drowned out" an alternative construction advanced by a civil RICO plaintiff); *Reves v. Ernst & Young*, 507 U.S. 170, 183 (1993) (noting that RICO's liberal construction clause "is not an invitation to apply RICO to new purposes that Congress never intended").

Amici are confident that the rule they have proposed would sufficiently clarify and limit RICO's scope to permit efficient business planning and protect necessary and economically advantageous contractual relationships from meritless RICO attack. Should the Court decline to adopt the proposed bright-line, however, amici urge the Court to resolve the split among the circuit courts by making it clear that a RICO enterprise cannot consist merely of a corporation and the third-party service providers it uses in the course of carrying out its normal business operations. *See, e.g., Brittingham*, 943 F.2d at 300-02; *Baker*, 357 F.3d at 691; *Fitzgerald*, 116 F.3d at 226-27; *Discon*, 93 F.3d at 1064. If this Court were to adopt the Eleventh Circuit's loose definition of association-in-fact enterprise, American businesses will face the needless transactional and litigation costs, incentives for distorted business planning, and foregone commercial opportunities discussed above.

CONCLUSION

For the foregoing reasons, the judgment of the Eleventh Circuit should be reversed.

Respectfully submitted,

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